IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 480

WARDEN, MARYLAND PENITENTIARY,
Petitioner,

v.

BENNIE JOE HAYDEN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The Warden of the Maryland Penitentiary, by Thomas B. Finan, Attorney General of Maryland, and Franklin Goldstein, Assistant Attorney General of Maryland, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on April 21, 1966, and as to which a Petition for Rehearing En Banc was denied June 3, 1966.

CITATIONS TO OPINIONS BELOW

The majority and dissenting opinions of the Circuit Court of Appeals, together with the additional dissenting opinion filed at the time of the Order denying a Rehearing En Banc, are printed in the Appendix hereto, *infra*, pages 1a to 19a, and are as yet unreported.

The opinion of the District Court for the District of Maryland, which was reversed by the majority opinion of the Circuit Court of Appeals, is unreported and is printed in the Appendix hereto, *infra*, pages 22a-29a.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 21, 1966 (Apx. 20a). A Petition for Rehearing En Banc was timely filed, and on June 3, 1966, an Order was filed denying a Rehearing En Banc (Apx. 21a). A judgment in lieu of mandate was issued to the District Court for the District of Maryland on June 13, 1966, and upon a Motion to Recall the Mandate the judgment in lieu of mandate was recalled on July 13, 1966, pending this application for a Writ of Certiorari. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Does the Fourth Amendment to the Constitution of the United States permit reasonable seizures of relevant evidential material, obtained in the course of a reasonable search, pursuant to a lawful arrest?

2. May experienced trial counsel, as part of trial tactics, waive the accused's right to object to the introduction of certain evidence?

CONSTITUTIONAL PROVISION INVOLVED

Amendment IV to the Constitution of the United States:

> "The rights of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

By a two to one decision, the United States Court of Appeals for the Fourth Circuit reversed a decision of the District Court for the District of Maryland and held that the decisions of the Supreme Court interpreting the Fourth Amendment to the Constitution of the United States prohibit otherwise reasonable seizures of relevant evidential items (the clothing which was worn during the commission of a felony, which was observed by the witnesses and which was discarded to escape detection) obtained in the course of a reasonable search pursuant to a lawful arrest, merely because the items could not be classed as "weapons, means, fruits or contraband". The dissenting opinion holds that the seizure of the clothing was reasonable under the circumstances and therefore was not prohibited by the Fourth Amendment or the decisions of this Court. The dissenting judge further indicates that, under the facts of the instant case, the clothing could be considered as a means of committing the crime and the discarding of the clothing could be considered as a means of avoiding detection. In conjunction with the denial of a Petition for Rehearing En Banc, Chief Judge Haynsworth also found the seizure of the clothing to be reasonable and not prohibited by the Fourth Amendment or the decisions of this Court.

Both the Circuit Court of Appeals and the District Court found the relevant facts to be essentially undisputed, and the facts relevant to a decision by this Court on this Petition for a Writ of Certiorari are as follows:

An armed robbery, in which approximately $363.00 was taken, occurred at 8 o'clock in the morning of March 17, 1962, on the premises of the Diamond Cab Company in Baltimore, Maryland. Two cabdrivers who were then within one-half block from the scene of the robbery independ-

ently followed the robber from the scene to a small row house at 2111 Cocoa Lane. One cabdriver had followed in his cab and was able to notify his dispatcher on the cab radio of the fact that he observed the robber run into 2111 Cocoa Lane. He gave the dispatcher a description of the robber as a negro, about 5 feet 8 inches tall, wearing a light cap and a dark jacket similar to a truck driver's uniform. The dispatcher immediately relayed all of this information to the police, who were then proceeding to the scene of the robbery and who then instead proceeded to 2111 Cocoa Lane.

The police arrived at 2111 Cocoa Lane within minutes of the time the robber had entered the house. The police knocked on the door; Mrs. Hayden answered the door; she was told by the police that a robber had entered and she admitted them without objection. The police looked briefly around the first floor of the small house and saw that there was no male hiding there. Therefore, one officer proceeded to the basement and two other officers proceeded upstairs. The officer who had gone to the basement called upstairs and said that there was no person hiding in the basement. The other two officers observed that Mr. Hayden, who was feigning sleep, was the only male in the house and therefore asked him to get out of bed; they thereupon arrested him.

At this time one officer heard a toilet running in the bathroom adjacent to the bedroom in which Mr. Hayden was found. The officer placed his hands in the flush tank and seized a sawed-off shotgun and a pistol. While searching Mr. Hayden's room for the weapons and the money, the police found ammunition for the guns and also found a sweater and a cap, similar to that described, under Mr. Hayden's mattress. The officer in the basement, in the course of his search to ascertain that no male was in the

basement, saw a washing machine. In the course of his search for either the man or the money, he looked into the washing machine and saw a jacket and a pair of pants to what looked like a truck driver's uniform with the belt still in the trousers. These items also fit the description of the clothing the suspected robber was wearing at the time the offense was committed. All of the above items were found by the police within one hour of the time of their entry into the house to arrest Mr. Hayden. Within one hour of the time of entry by the police, Mr. Hayden was taken from his home to police headquarters and the search was terminated. The money was not found and Mr. Hayden gave no statement to the police.

The seized items were admitted into evidence at Mr. Hayden's trial without any objection on the part of his privately-retained counsel, who was very experienced in the field of criminal law. At the trial Mr. Hayden's privately-retained counsel cross-examined the identification witnesses very carefully as to the precise color of the clothing which the robber was wearing and utilized the clothing in his cross-examination. Mr. Hayden's counsel also stressed the fact that, in spite of a very thorough search, no money had been found.

Mr. Hayden was convicted of robbery with a deadly weapon and sentenced to 14 years in the Maryland Penitentiary. He did not appeal his conviction but did file a petition for relief under the Maryland Post Conviction Act, which was denied without the taking of testimony. On application for leave to appeal from this action, the Maryland Court of Appeals remanded the case for an evidentiary hearing, which was held. After the hearing, the post conviction judge denied relief, holding that "the search of his home and seizure of the articles were proper". Once again Mr. Hayden filed an application for leave to appeal

to the Maryland Court of Appeals but, before the application could be acted upon, he requested to withdraw the application and his request was granted. Three months later Mr. Hayden filed the instant habeas corpus proceeding. After a full evidentiary hearing, the United States District Court for the District of Maryland (Thomsen, C.J.) found that the arrest was made in "hot pursuit" with the officers having probable cause to believe that a felony had been committed and that the felon was hiding in the house. Judge Thomsen found that the extent of the search under the circumstances was reasonable and was a much less extensive search than the search approved in *Harris v. United States*, 331 U.S. 145, 91 L. Ed. 1399 (1947). Judge Thomsen denied the relief requested by Mr. Hayden.

Even the judges in the majority opinion in the Circuit Court of Appeals agreed with Judge Thomsen that the arrest was legal as being one made in "hot pursuit". They also agreed that the extent of the search was reasonable since the house was small, was under the complete control of Mr. Hayden, and the entire arrest and search lasted one hour. The Circuit Court of Appeals also found that the search was much less extensive than that approved in *Harris v. United States, supra.*

The entire Circuit Court of Appeals found that the seizure of the guns was proper, but the majority held that there is a constitutional prohibition arising out of the Fourth Amendment against the seizure of the cap, jacket and trousers which Mr. Hayden was wearing at the time he committed the felony and which he discarded immediately upon entering the house in order to avoid detection. The majority opinion recognizes that the seizure here was a reasonable one and further recognizes that the so-called

"mere evidence" rule, which was applied, has been severely criticized. Both the majority and dissenting opinions expressed doubt as to the reasonableness of the "mere evidence" rule itself. However, the majority opinion held that the court was bound by decisions of this Court to apply the "mere evidence" rule to state criminal proceedings.

REASONS FOR GRANTING THE WRIT

Both the majority and dissenting judges of the Circuit Court of Appeals and the attorneys representing the State and the petitioner in the Circuit Court of Appeals recognize the gravity of the majority decision and the effect it will have on prosecutions past, present and future within the states comprising the Fourth Circuit. All recognize that this is the first time that the "mere evidence" rule has been held applicable in a state criminal proceeding to the seizure of the clothing used in the commission of a felony where the clothing was seized during a reasonable search pursuant to a lawful arrest and would itself constitute relevant and material evidence that the crime had been committed and/or that the owner of the clothing was the perpetrator of the felony. Both the majority and the dissent in the Circuit Court of Appeals expressed the desire that this Court "expose the doctrine [the "mere evidence" rule] to re-examination and re-interpretation with a view to formulating sufficiently flexible guide lines without endangering constitutional protections" (Apx. 13a).

Your Petitioner believes that all of the most cogent reasons for granting a writ of certiorari exist in the instant case. Your Petitioner will discuss separately each of the following reasons for granting the writ.

1. There is a direct conflict between the majority opinion and decisions of this Court.

2. There is a direct conflict between the majority opinion and decisions in other United States Circuit Courts of Appeals and also in United States District Courts.

3. There is a direct conflict between the majority opinion and the decisions of the highest courts of many states.

4. The issue involved is an important one, has far-reaching effects, and the majority opinion would make it almost impossible for law enforcement officers to place greater dependence upon their resources for scientific investigation.

5. Both the majority and dissenting judges of the United States Court of Appeals for the Fourth Circuit recognize that the "mere evidence" rule as applied in this case is totally unreasonable and have asked that this Court grant the writ and re-examine this entire area in the light of modern developments.

Your Petitioner has set forth as a second question presented the issue of whether or not experienced trial counsel in the instant case waived the Respondent's right to object to the admission of the clothing into evidence. This issue will not be discussed further in this Petition for Writ of Certiorari since the Petitioner merely wishes to preserve it in the event that this Court sees fit to grant the writ of certiorari for any other reasons set forth herein. Petitioner believes that the fact that there was a deliberate waiver as part of trial tactics will be fully evident from the record in this case.

I.

Conflict With Decisions of This Court

In the case of *Ker v. California*, 374 U.S. 23, 10 L. Ed. 2d 726, 737-738 (1963), in that part of the opinion in which eight of the justices joined, this Court expressed the view that the Fourth Amendment is not "susceptible of Pro-

crustean application" when applied to the states. This Court said:

> "This Court's long-established recognition that standards of reasonableness under the Fourth Amendment *are not susceptible of Procrustean application* is carried forward when that Amendment's proscriptions are enforced against the States through the Fourteenth Amendment. . . ."
>
> * * * * * *
>
> ". . . *The States are not thereby precluded from developing workable rules governing arrests, searches and seizures to meet 'the practical demands of effective criminal investigation and law enforcement' in the States,* provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain. . . ." (Emphasis supplied.)

Even the majority opinion of the Circuit Court of Appeals recognizes that the "mere evidence" rule as applied to the instant case is unreasonable but states that prior decisions of this Court require all inferior Federal courts, like Procrustes, to tie the states and their reasonable search and seizure rules upon an iron bed and then either stretch or cut off their legs to adapt them to the length of the iron bed of Federal Rules of Criminal Procedure, Rule 41b, (18 U.S.C.A., Rule 41b). However, the *Ker* case, which postdates all the "mere evidence" opinions relied upon by the Circuit Court of Appeals, holds that the decisions of this Court do not intend to require inferior courts to impose unreasonable restraints on state rules as to searches and seizures.

Both the majority and the minority judges of the Circuit Court of Appeals recognize as reasonable the rule uniformly applied in all states which do not have a rule or

statute similar to Rule 41b, *supra;* see *State v. Coolidge,* 208 A. 2d 322, 333 (N.H., 1965). However, the majority judges believe that the decisions of this Court require them to be unreasonable in applying to the states an amendment to the Constitution of the United States which itself cries only for reasonableness. The *Ker* case stands squarely for the proposition that the Circuit Courts of Appeals do not have to invalidate state rules as to seizures which the Circuit Courts of Appeals find to be reasonable.

In addition, in recent cases with regard to the admission of confessions, such as *Miranda v. Arizona,* ..... U.S. ....., 16 L. Ed. 2d 694, this Court has placed great emphasis upon law enforcement officials placing greater dependence upon their resources for scientific investigation. As Chief Judge Haynsworth pointed out in his comments on the Petition for a Rehearing En Banc, such investigatory procedures will be of little use if the law enforcement officials are unable, even in a reasonable search pursuant to a lawful arrest, to obtain the articles of clothing worn while the felony was being committed for use in connection with their scientific investigation.

II.

Conflict With Decisions of Other United States Circuit Courts.

In the case of *United States v. Guido,* 251 F. 2d 1, 3 (7th Cir., 1958), *cert. den.* 356 U.S. 950, 2 L. Ed. 2d 843, the shoes worn at the time the crime was committed were held to be implements or means of committing the crime and therefore subject to seizure. The case of *United States v. Guido, supra,* was relied upon by the dissenting judge in his opinion. The majority opinion rejects the reasoning of *United States v. Guido, supra,* even though, as the dissent points out, the discarding of the clothing immediately upon

entering the house was a vital part of the robber's attempt to avoid detection.

The majority opinion here, also seems to be in conflict with another recent decision of the Fourth Circuit itself and two decisions of the United States Court of Appeals for the District of Columbia. In *Leek v. State of Maryland*, 353 F. 2d 526 (4th Cir., 1965), *Whalem v. United States*, 346 F. 2d 812 (D.C. Cir., 1965) *cert. den.* 382 U.S. 862, 15 L. Ed. 2d 100 (1965) and *Robinson v. United States*, 283 F. 2d 508 (D.C. Cir., 1960), *cert. den.* 364 U.S. 919, 5 L. Ed. 2d 259 (1960) it was held that law enforcement officials could seize and utilize, for laboratory investigation or as an aid to identification, clothing which the accused was wearing at the time of his arrest. As the dissenting opinion indicates it is difficult to see how the articles of clothing here, "were instantaneously immunized by his [Respondent's] disrobement . . ." (Apx. 15a).

In the case of *Trotter v. Stephens*, 241 F. Supp. 33, 40-41 (E.D. Ark., 1965) the articles of clothing in the possession of accused rapists, and not being worn by them, were held to be seizable, in direct conflict with the holding of the majority in the instant case. The *Trotter* case appears to hold that such clothing is seizable whether or not it is considered a means of committing a crime.

It is therefore apparent that federal courts in other circuits will have three possible points of conflict with the majority opinion in the instant case. Firstly, additional circuits may adopt the reasoning of *Guido*, that it would be difficult for an individual to go into the streets to perpetrate a crime while naked and, therefore, the clothing which he wears is a means of committing the crime. One does not have to utilize a mask to disguise one's self, and other circuits may adopt this reasoning to justify labelling

the clothing worn during the commission of a crime as a means of committing the crime and avoiding detection.

Secondly, all Circuits including the Fourth Circuit itself will continue to allow seizure of and use of clothing taken from the person of the accused.

Thirdly, it is probable that other circuits will adopt the apparent holding of *Trotter v. Stephens, supra*, and the actual holding of the highest courts of many states, which will be discussed *infra*, that items of evidential value may be seized whether or not labelled as a means of committing a crime.

III.

Conflict With Decisions of Highest Courts of the States.

The case of *People v. Thayer*, 408 P. 2d 108, 109 (Sup. Ct. Cal., 1965), *cert. den.* ..... U.S. ....., 16 L. Ed. 2d 361 (1966), is the most recent opinion of the highest court of a state which is in total conflict with the majority opinion in the instant case. The majority opinion discusses the opinion of Chief Justice Traynor in *People v. Thayer, supra*:

> "We are mindful that eminent judges and scholars have challenged the correctness and wisdom of the rule that precludes the seizure and admission in evidence of articles having evidential value only, even if the search which produced them was itself reasonable and lawful. Chief Justice Traynor has sharply criticized the rule as 'an unfortunate . . . legal absurdity' and has argued further that it is not of such fundamental importance as to be applicable to the states through the Fourth and Fourteenth Amendments. . . ." (Apx. 11a-12a).

The Court of Appeals of Maryland has consistently sustained the seizure of evidential items. *Davis v. State*, 236

Md. 389, 204 A. 2d 76 (1964), bloodstained shoes and clothing in a murder case; *Matthews v. State,* 228 Md. 401, 179 A. 2d 892 (1962), soiled sheets in a prosecution for keeping a disorderly house; *Shorey v. State,* 227 Md. 385, 177 A. 2d 245 (1962), bloodstained clothes and soiled trousers in a rape case; *Lucich v. State,* 194 Md. 511, 71 A. 2d 432 (1950), lottery slips in a prosecution for keeping a disorderly house.

In *State v. Bisaccia,* 213 A. 2d 185 (Sup. Ct. N.J., 1965), Chief Justice Weintraub, while expressing doubt that states have leeway to adopt a rule for search at variance with the federal rule allegedly fashioned by this Court, reasoned that shoes with distinctive heels worn by a defendant while committing an armed robbery were a means of committing the crime and could be seized. New Jersey has therefore adopted the reasoning of *Guido, supra.*

It has been pointed out in *State v. Coolidge, supra,* that in all states where there is no rule such as Rule 41b of the Federal Rules of Criminal Procedure the courts hold that there is no limitation on the seizure of evidential items in a reasonable search pursuant to a lawful arrest. Even in those states which have a rule similar to Rule 41b, the courts often adopt the reasoning of *United States v. Guido, supra,* and extend the normal concept as to what items are used as a means of committing a crime. In *State v. Chinn,* 231 Ore. 259, 373 P. 2d 392 (1962), a camera, soiled bed sheets and empty beer bottles were held to be means of committing statutory rape.

The unanimity among the highest courts of the states in either rejecting the "mere evidence" rule or finding some way to avoid it illustrates the intense conflict between the majority opinion and the practice throughout the states. It also illustrates what even the majority opinion in the

instant case recognizes — that the application of the "mere evidence" rule to the facts of the instant case is totally unreasonable.

IV.

Importance of the Issue Involved

The clothing which a person wears during the commission of a felony may often be the most relevant and least able to be contradicted evidence to connect the accused with the commission of the felony. It is also a most reasonable and logical item for the police to seize in the course of a reasonable search pursuant to a lawful arrest. In this case the clothing which was worn during the commission of the felony was quite distinctive and was described to the police by the witnesses. In many cases the clothing will contain other invaluable evidence that a crime has been committed, including semen stains in a rape case, bloodstains in an assault or murder case, and paint scrapings in a burglary case. In all of these cases the clothing would be vital in order for the police to conduct a thorough scientific investigation, as has been suggested by this Court.

It has been previously indicated that in cases such as *Leek v. State of Maryland, supra; Whalem v. United States, supra;* and *Robinson v. United States, supra,* the police seizure of the clothing which an accused was wearing at the time of arrest was permissible. In *Leek,* the clothing was taken from the accused, sent to a laboratory and revealed spermatozoa on the accused's underwear, and in *Robinson v. United States, supra,* the clothing was taken, sent to a laboratory and revealed paint chips and other debris corresponding to materials found at the scene of a burglary. In *Whalem v. United States, supra,* the clothing

was taken and was used, as in the instant case, as an aid to identification of the accused.

In view of the fact that the clothing worn during the commission of a felony is such an important item in proper investigation and in view of the fact that the majority opinion in the instant case may cause considerable confusion when it is compared with *United States v. Guido, supra; Leek v. State of Maryland, supra; Robinson v. United States, supra;* and *Whalem v. United States, supra,* it is vital to the law enforcement officials and to those persons accused of crime and attorneys who represent them that the confusion in this area be eliminated. This Court has denied petitions for writs of certiorari in *People v. Thayer, supra; Whalem v. United States, supra; Robinson v. United States, supra;* and *United States v. Guido, supra,* which only compounds the confusion as to when the law enforcement officials may seize the clothing and utilize it and when they may not do so. It is apparent that different results will prevail among the Circuits.

Confusion as to what the law is aids neither the law enforcement officials nor those accused of crime. All would be benefited if this Court were to review this important area and formulate proper guide lines with regard to the search and seizure of "evidential items" without endangering necessary constitutional protections.

V.

The Entire United States Court of Appeals for the Fourth Circuit Has Asked That This Court Grant Certiorari.

All of the judges of the United States Court of Appeals for the Fourth Circuit have recognized the importance of the issue involved here, as discussed in the previous reason

for granting the writ. They have all recognized the very tenuous distinction between what is a means or instrumentality of committing a crime and what is not. They have all recognized the fact that many courts stretch "to the point of distortion the category of 'instrumentalities of crime'" (Apx. 13a). The United States Court of Appeals for the Fourth Circuit also recognizes the apparent difference in result if the police arrive while the accused is disrobing rather than arriving a few minutes after he has disrobed.

We believe that the following hypothetical situation clearly illustrates the unreasonableness of the majority view in the instant case and the reason why both the majority and dissent believe that this Court should review the so-called "mere evidence" rule.

A rapes B at knife-point. B screams and the police arrive at the scene. A runs off and B points to A and says, "That man raped me at knife-point." The police follow A and A runs into a house. A takes off his pants and shirt and throws them and the knife under a chair near the front door. The police come in to arrest A and A is sitting in a chair reading a newspaper in his undershorts and undershirt. The police observe the clothing and the knife under the chair. They arrest A, take the knife and the pants and shirt. The pants are semen-stained and also contain bloodstains which laboratory analysis identifies as the same type as the blood of B. According to the majority of the Circuit Court of Appeals, the police could seize the knife but not the clothing. Also, according to the majority, if the police arrive after A had taken off his pants and thrown them under the chair but before he had taken off his shirt, they could seize the shirt which contains no stains and subject it to laboratory analysis, but they could not seize the pants and subject them to laboratory analysis.

There is absolutely no justification for saying that the Constitution or decisions of this Court interpreting the Fourth Amendment provide that there should be such a great distinction in what the police may lawfully seize between the situation where the police arrive a few seconds before a suspect has disrobed and the situation where the police arrive a few seconds after he has disrobed. The unreasonableness of the distinction is further illustrated by the fact that the very purpose for which the suspect disrobes is to avoid detection.

Where the arrest is legal and the search is reasonable, there is absolutely no reason for providing that the police may not seize the clothing worn during the commission of a felony. This is especially true where it is apparently uniformly recognized that the very same clothing is seizable and admissible into evidence if it happens that the accused is wearing it at the time he is arrested.

CONCLUSION

For the reasons set forth above, it is apparent that a decision by this Court to grant the writ of certiorari and to review this case would enable this Court to resolve direct conflicts between the majority opinion and decisions of this Court, decisions of the other United States Circuit Courts of Appeals, and decisions of the highest courts of many states. It would also enable this Court to reconsider an area of constitutional law that has not been fully considered by this Court in recent years. It is an area of vital importance to all law enforcement officials and to all those accused of crime. It is also an area in which there is much confusion as to what the law is and what it should be.

Therefore, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

OPINIONS BELOW

OPINIONS OF THE CIRCUIT COURT

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10,061

BENNIE JOE HAYDEN,
Appellant,

versus

WARDEN, MARYLAND PENITENTIARY,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE.
(ROSZEL C. THOMSEN, District Judge)

(Argued October 8, 1965. Decided April 21, 1966.)

(Petition for rehearing en banc denied June 3, 1966.)

Before SOBELOFF, BOREMAN and BRYAN, Circuit Judges.

Albert, R. Turnbull (Court-assigned counsel) [Fine, Fine, Legum, Schwan & Fine on brief] for Appellant, and Franklin Goldstein, Assistant Attorney General of Maryland, (Thomas B. Finan, Attorney General of Maryland, on brief) for Appellee.

SOBELOFF, Circuit Judge:

Appellant Hayden is serving a sentence of fourteen years in the Maryland Penitentiary, having been convicted and sentenced in the Criminal Court of Baltimore City in June,

1962, for robbery with a deadly weapon. After a hearing in the District Court on his application for a writ of habeas corpus, relief was denied, and from this action an appeal was taken.

In this court the petitioner's basic contention is that certain evidence admitted at trial was the product of an unconstitutional search and seizure. The state maintains that the search and the seizure were lawful, and urges further that, even if unlawful, petitioner has waived his right to raise the issue in the federal courts because of his failure to object at trial, failure to appeal from the conviction, and withdrawal of his appeal from the state court's denial of post-conviction relief.

I

An armed robbery occurred at eight o'clock on the morning of March 17, 1962, on the premises of the Diamond Cab Company in Baltimore. Two cab drivers saw a man running from the scene and heard shouts of "hold up, stop that man." The cab drivers, proceeding independently, followed the suspected robber to 2111 Cocoa Lane. One of the drivers actually saw him enter the house. The police were immediately notified and in a few minutes arrived at that address. They had been told that the offender was a Negro about 5'8", 25 years old, and wore a light cap and dark jacket.

The police knocked at the door and Hayden's wife answered. The officers told her that they had information that a holdup man was in the house. There is some dispute as to whether or not Mrs. Hayden objected to the entry of the officers. However this may be, several officers entered and went to all three floors, and when no man other than Hayden was found in the house, they arrested him. They seized a sawed-off shotgun and a pistol which they found in the flush tank of the toilet, some ammunition, a sweater, and a dark gray cap, found under Hayden's mattress, shotgun shells lying in a bureau drawer, and a man's jacket and trousers with a belt, discovered in a washing machine in the basement. The police, however, found no stolen money.

The seized items were admitted in evidence without objection by the defendant's retained counsel. The clothing was used to fix the identity of Hayden as the man seen running from the scene of the crime and into 2111 Cocoa Lane.

Hayden failed to appeal his conviction, but upon his confinement in the Maryland Penitentiary he promptly petitioned the state court for relief under the Maryland Post-Conviction Procedure Act. Relief was denied without the taking of testimony. On appeal from this action the Maryland Court of Appeals remanded the case for an evidentiary hearing with respect to the challenged lawfulness of the search and seizure. After testimony, the post-conviction judge again denied relief, holding "that the search of his home and seizure of the articles in question were proper."

Thereupon, Hayden applied for leave to appeal to the Court of Appeals of Maryland. Before his application was acted upon, however, he requested its withdrawal. The request was granted.[1] He filed the instant habaes corpus petition three months later. His right to appeal to the Court of Appeals of Maryland is now barred by time.

II

A. We deal first with the failure of trial counsel to make a contemporaneous objection to the admission of the seized articles. The state contends that the failure to object at trial constitutes a waiver by Hayden of his right to assert the constitutional claim in a federal habeas corpus proceeding. In order to preclude consideration of the constitutional claim on federal habeas corpus the state must show that Hayden, acting through his attorney, voluntarily relinquished a known right by failing to object at trial[2] and that

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[1] In the meantime, during the pendency of his application for state post-conviction relief, Hayden had filed two habeas corpus petitions in the federal District Court, both of which had been denied for failure to exhaust available state remedies.

[2] The state in its brief speculates that the failure to object was a tactical maneuver on the part of Hayden's trial counsel. The state attributes to him a deliberate purpose to allow the admission of the clothing, so that he might create a reasonable doubt in the minds of the jurors by arguing to them that the police officers conducted a more

the failure to object constitutes an independent and adequate state ground. See *Henry v. Mississippi*, 379 U.S. 443, 452 (1965), *relying on Fay v. Noia*, 372 U.S. 391, 438–39 (1963).[3] See also *Dillon v. Peters*, 341 F.2d 337, 339 (10th Cir. 1965).

It is unnnecessary in this case to reach the question of whether Hayden voluntarily relinquished his constitutional claim, for in the state post-conviction proceedings the Court of Appeals of Maryland did not look upon the failure to ob-

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than usually thorough search and yet were unable to find any stolen money. Hayden's trial counsel, however, testified in the District Court habeas hearing that he did not object because he was under the impression that the arrest and the search were lawful and thought the articles could not be excluded. Aside from the fact that there is a total absence of testimony to support the state's hypothesis, the tactical maneuver postulated by the state is wholly unrealistic, for the lawyer could have laid a foundation for the same argument to the jury by cross-examination of the police officers. The argument would have been readily available without subjecting the defendant to the damage obviously resulting from the admission of the clothing.

[3] In *Henry*, a case coming to the Supreme Court on direct appeal from a state conviction, it was said:

> "* * * a dismissal on the basis of an adequate state ground would not end this case; petitioner might still pursue vindication of his federal claim in a federal habeas corpus proceeding in which the procedural default will not alone preclude consideration of his claim, at least unless it is shown that petitioner deliberately bypassed the orderly procedure of the state courts. *Fay v. Noia*, *supra*, at 438." 379 U.S. at 452.

And at page 447 of the *Henry* opinion the Court observed:

> "[It is settled] that a litigant's defaults in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest. In every case we must inquire whether the enforcement of a procedural forfeiture serves such a state interest."

Whether the Supreme Court has in fact abolished the "independent and adequate state procedural ground" as a basis for denying relief in federal habeas corpus proceedings need not, as the text will indicate, be determined in this case. For an affirmative answer to the question, as well as a penetrating analysis of Henry v. Mississippi and Fay v. Noia, see Hill, "The Inadequate State Ground," 65 Colum. L. Rev. 943, 997 (1965). *But cf.* Henderson v. Heinze, 349 F.2d 67 (9th Cir. 1965); Nelson v. People of State of California, 346 F.2d 73 (9th Cir. 1965).

ject as a bar to his constitutional claim. Instead it remanded the case to the lower court for a determination of the legality of the search and seizure. *Hayden v. Warden, Maryland Penitentiary*, 233 Md. 613, 195 A.2d 692 (1963). Since the Court of Appeals of Maryland did not interpose the failure to object as a bar to consideration of the merits of the constitutional issue, denial of state post-conviction relief cannot be said to rest on an independent state ground. The District Court was therefore not precluded from considering the constitutional question on its merits. *Cf. Henderson v. Heinze*, 349 F.2d 67 (9th Cir. 1965); *Nelson v. People of State of California*, 346 F.2d 73 (9th Cir. 1965); *Rhay v. Browder*, 342 F.2d 345 (9th Cir. 1965).

When the highest court of a state has declined to invoke an independent state ground and has proceeded to the merits of a federal question, it would be incongruous for a federal court to assert the state ground to shut off its review of the federal question. There appears to be no reason for a federal court to refuse to vindicate a federal claim by a more exacting insistence on state procedural requirements than the state court itself demanded. The so-called independent ground, not having been relied on by the state, is simply irrelevant.

B. With respect to Hayden's failure to prosecute an appeal from his conviction and the withdrawal of his application for leave to appeal from the state post-conviction decision, the District Court determined that no such deliberate bypass occurred as would prevent Hayden from raising in the federal court the constitutional issue of illegal search and seizure. We uphold the District Court's determination. Hayden's letter to the clerk of the Court of Appeals of Maryland requesting withdrawal of his application for leave to appeal displays complete ignorance of both the judicial process and the consequences of not pursuing his judicial remedies in an orderly fashion.[4] Under these

[4] Hayden's letter reads:

"Dear Mr. Young:

"I have an application for leave to appeal under the post conviction procedure act which is docketed at No. 18 Sept. term 1964. Since the

circumstances we cannot find error in the District Court's determination of no deliberate bypass. See *Fay v. Noia*, 372 U.S. 391 (1963); *Pruitt v. Peyton*, 338 F.2d 859, 860–61 (4th Cir. 1964); *Hunt v. Warden, Maryland Penitentiary*, 335 F.2d 936, 944 (4th Cir. 1964).

III

Turning to the merits of Hayden's petition, we do not disagree with the District Court's determination that the arrest was lawful and the search conducted as an incident thereof constitutionally permissible:

A. Appellant does not strenuously contest the legality of his arrest. He concedes that the officers had probable cause to believe that a felony had been committed and that the felon was hiding in the house. There was testimony that the officers knocked on the door and announced the purpose of their entry. The District Court so found the facts and concluded that regardless of the asserted lack of consent on the part of Mrs. Hayden to the entrance of the police, the officers were within their legal powers in entering in "hot pursuit" of a suspected felon.[5]

Although the appellant concedes the right of the police to conduct a search as an incident to the lawful arrest, he maintains that in its extent the search exceeded constitutionally permissible limits. The testimony showed that when the officers, approximately five in number, entered they knew only that a man suspected of robbery had run into the house. Not finding the suspect on the first floor,

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opinion by Judge Sodaro is based on assertions contrary to the trial testimony which is in the trial transcript.

"After considering the opinion and the transcript I feel that this appeal is worthless since the statements in the opinion are far from being true, this being so I feel it is the wiser course to refile again in the lower State Court and since I can not have two actions pending at the same time I must withdraw my application for leave to appeal.

"I am sorry I waited so late to make up my mind but I am no lawyer and it took me quite some time to make the wiser decision.

"Yours Very Truly

/s/ BENNIE JOE HAYDEN"

[5] The trial judge in the state post-conviction proceeding found that Mrs. Hayden had consented to the entry of the police.

one officer proceeded to the basement while others went to the second floor, where they found Hayden. Learning that he was the only male in the house, the police arrested him, and conducted a search.[6] The arrest and search lasted one hour. In its extent the search did not exceed the broad limits tolerated in *Harris v. United States*, 331 U.S. 145 (1947), where the Supreme Court affirmed the validity of an intensive five-hour search of all four rooms of an apartment, undertaken as an incident to a lawful arrest.

B. This brings us to the principal substantive issue presented by this appeal. The petitioner contends that even if the search itself were legal, the articles of clothing seized by the police were "of evidential value only" and that under the principle repeatedly declared by the Supreme Court, items having evidential value only are not subject to seizure and must be excluded at trial. *Gouled v. United States*, 255 U.S. 298, 310 (1921); *United States v. Lefkowitz*, 285 U.S. 452, 464–66 (1932). See also *Abel v. United States*, 362 U.S. 217, 234–35 (1960); *Harris v. United States*, 331 U.S. 145, 154 (1947). The petitioner maintains therefore that under *Mapp v. Ohio*, 367 U.S. 643 (1961), the admission of the articles of clothing at his state trial violated his constitutional rights.

It cannot be doubted that the proscription against seizure of articles of only evidential value is one of constitutional dimensions. *E.g., Gouled v. United States*, 255 U.S. 298, 310 (1921); *United States v. Lefkowitz*, 285 U.S. 452, 464–67 (1932).[7] In *Harris v. United States*, 331 U.S. 145, 154 (1947),

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[6] It is unclear whether the clothing taken from the washing machine in the basement was procured before or after the arrest. In the view we take of the case it is unnecessary to resolve this ambiguity in the testimony.

[7] The state contends that the proscription against the seizure of articles of only evidential value is merely an exercise of the supervisory power of the federal courts and does not rise to constitutional proportions. While it is true that Rule 41(b) of the Federal Rules of Criminal Procedure, 18 U.S.C.A. § 41(b), may be interpreted to preclude such seizures, the Supreme Court has not relied on mere supervisory rules to support its decisions on this point, but has instead specifically grounded its decisions on the Fourth Amendment.

Chief Justice Vinson, relying on the above cited cases, and others, said:

> "This Court has frequently recognized the distinction between merely evidentiary materials, on the one hand, which may not be seized either under the authority of a search warrant or during the course of a search incident to arrest, and on the other hand, those objects which may validly be seized including the instrumentalities and means by which a crime is committed, the fruits of crime such as stolen property, weapons by which escape of the person arrested might be effected, and property the possession of which is a crime."

The dissenting opinions of Justices Frankfurter, pp. 155, 165–66, and Murphy, pp. 183, 187–88, 191, specifically recognized the distinction made by the majority between items subject to seizure and items which may not lawfully be seized. Thus, in the case dealing with the most extensive search ever validated by the Supreme Court, we find the Justices in the majority and those in dissent unanimous in condemning seizures by the police and the later use by the prosecution of articles having evidentiary value only.

The clothing in this case in no way constitutes the "means by which the crime was committed," unlike the things lawfully taken in *Abel v. United States*, 362 U.S. 217, 237–38 (1960) (forged birth certificate and graph paper with coded message used to conduct espionage activities); *Zap v. United States*, 328 U.S. 624, 629 & n.7 (1946) (cancelled check used to defraud the Government); *Marron v. United States*, 275 U.S. 192, 198–99 (1927) (business ledger and various bills used to operate an illegal business); *Gottone v. United States*, 345 F.2d 165, 166 (10th Cir.), *cert. denied*, 382 U.S. 901 (1965) (lists of names and addresses with unexplained notations, race track results, and odds sheets used to operate illegal gambling business); *United States v. Boyette*, 299 F.2d 92, 94–95 (4th Cir.), *cert. denied*, 369 U.S. 844 (1962) (guest checks used in the operation of a brothel). There is no contention that the articles seized here were used by the felon as a disguise.

Nor did the possession of the clothing constitute a "continuing crime." Examples of types of articles the possession of which constitutes a continuing crime can be found in *United States v. Rabinowitz,* 339 U.S. 56, 64 (1950) (forged and altered United States postage stamps), and *Harris v. United States,* 331 U.S. 145, 154–55 (1947) (false selective service cards). No discussion is required to demonstrate that the clothing was neither contraband nor the fruit of the crime.

No Supreme Court case has discussed the seizure of clothing. *Cf. Kremen v. United States,* 353 U.S. 346 (1957) (indiscriminate seizure of the entire contents of a cabin illegal). Lower federal courts, however, have had occasion to consider the subject. See *Morrison v. United States,* 262 F.2d 449, 450–51 (D.C. Cir. 1958) (handkerchief containing tangible evidence of morals offense of "evidential value only" and therefore held not subject to seizure); *United States v. Lerner,* 100 F. Supp. 765, 768 (N.D. Calif. 1951) (identification bracelet, and documents, "merely evidentiary materials tending to connect the defendant with the crime for which he was arrested" — harboring or concealing a fugitive — and therefore held constitutionally not seizable); *United States v. Richmond,* 57 F. Supp. 903, 907 (S.D. W.Va. 1944) (articles of wearing apparel useful in the identification of the defendant held not subject to seizure). *But cf. United States v. Guido,* 251 F.2d 1, 3 (7th Cir.), *cert. denied,* 356 U.S. 950 (1958) (shoes worn by bank robber held seizable as "the means" of committing the offense); *Trotter v. Stephens,* 241 F. Supp. 33, 40–41 (E.D. Ark. 1965) (articles of clothing in the possession of accused rapists seizable, although court does not advert to rule prohibiting seizure of articles of only evidential value).

In the case before us the articles of clothing were introduced at trial either to aid witnesses in their identification of the defendant or to create an adverse inference by arguing consciousness of guilt from the unusual condition of the clothes in the washing machine and particularly the presence of the belt in the trousers. However compellingly suspicious the circumstances, it cannot be denied that the value of the garment was "evidential only."

The *Richmond* case, above cited, 57 F. Supp. 903, bears a remarkable resemblance to the one under consideration. There, a federal agent observed a man working at an illicit still. The following day the agent went to the defendant's home for the purpose of arresting him if it should turn out that he was the person seen at the still. The agent made the arrest, and as an incident to this lawful arrest seized several articles of defendant's clothing which were later used in evidence for the purpose of demonstrating that other clothing found at the still matched that admittedly belonging to the defendant. The court concluded that even while the search itself was reasonable, the clothing it produced was of evidential value only and hence constitutionally immune from seizure.

The state stresses the fact that before entering Hayden's house, the police officers had been given a brief description of what the suspect was wearing, and that the article of clothing seized provided a strong link in the prosecution's case against Hayden. But the potency of the evidence to convict was not accepted in *Gouled* as justification for its admission, 255 U.S. at 310. In that case neither the officers' foreknowledge of the existence of the article seized, nor the prior issuance by a judicial officer of a search warrant describing the item served to validate the taking of "evidential" material. 255 U.S. at 307.

We recognize that the search conducted by the officers was lawful; but the law imposes limitations on the types of articles which agents of Government may seize either in the execution of a search warrant or in conection with a lawful arrest. A succinct explanation of the underlying constitutional principle was provided by Judge Learned Hand:

> "[I]t is only fair to observe that the real evil aimed at by the Fourth Amendment is the search itself, that invasion of a man's privacy which consists in rummaging about his effects to secure evidence against him. If the search is permitted at all, perhaps it does not make so much difference what is taken away, since the officers will ordinarily not be interested in what does not incriminate, and there can be no sound policy in pro-

tecting what does. Nevertheless, *limitations upon the fruit to be gathered tend to limit the quest itself* * * *." *United States v. Poller*, 43 F.2d 911, 914 (2d Cir. 1930) (Emphasis added.)[8]

From time to time the line has wavered in the adjudication of the lawfulness of searches, but in no instance has the Supreme Court faltered in its adherence to the distinction so clearly enunciated by Judge Hand between what may and what may not be seized in a lawful search.[9]

Nor do we perceive any rational distinction between private papers that are of only evidential value and articles of clothing of the same character. The Fourth Amendment guarantees that "the right of the people to be secure in their persons, houses, *papers, and effects* against unreasonable searches and seizures, shall not be violated." (Emphasis added.) Papers of only evidential value are not the sole items immune from seizure.[10]

We are mindful that eminent judges and scholars have challenged the correctness and wisdom of the rule that pre-

[8] This passage was cited with approval in United States v. Rabinowitz, 339 U.S. 56, 64 n.6 (1950). See also Comment, "Limitations on Seizure of 'Evidentiary' Objects — A Rule in Search of Reason," 20 U. Chi. L. Rev. 319, 327 (1953), which Professor McCormick has praised as "acute" and "extensive." *McCormick on Evidence*, § 139 n.1(b), p. 294. *But cf.* Comments, "Eavesdropping Orders and the Fourth Amendment," 66 Colum. L. Rev. 355, 367 (1966).

[9] See Gouled v. United States, 255 U.S. 298, 310 (1921); Marron v. United States, 275 U.S. 192, 198–99 (1927); United States v. Lefkowitz, 285 U.S. 452, 464–66 (1932); Davis v. United States, 328 U.S. 582, 587–89 (1946); Zap v. United States, 328 U.S. 624, 629 (1946); Harris v. United States, 331 U.S. 145, 154 (1947); Trupiano v. United States, 334 U.S. 699, 704 (1948); United States v. Rabinowitz, 339 U.S. 56, 64 (1950); Abel v. United States, 362 U.S. 217, 234–35 (1960); Shellow, "The Continuing Vitality of the *Gouled* Rule: The Search for and Seizure of Evidence," 48 Marq. L. Rev. 172, 175 (1964).

[10] The state argues that the exclusionary rule made applicable to the states by Mapp v. Ohio, 367 U.S. 643 (1961), should be applied only to items seized pursuant to an *unlawful* search, and not to things illegally seized in the course of a search which is itself not unlawful. We find no basis in reason or authority for such a distinction. In state as well as federal jurisdictions, the proscription against seizure of

cludes the seizure and admission in evidence of articles having evidential value only, even if the search which produced them was itself reasonable and lawful. Chief Justice Traynor has sharply criticized the rule as "an unfortunate * * * legal absurdity" and has argued further that it is not of such fundamental importance as to be applicable to the states through the Fourth and Fourteenth Amendments. *People v. Thayer*, 408 P.2d 108, 109 (Sup. Ct. Cal. 1965).[11] Chief Justice Weintraub, while expressing doubt that the states have leeway to adopt a rule for search at variance with the federal rule fashioned by the Supreme Court, reasoned that shoes with distinctive heels worn by the defendant while committing an armed robbery were an instrumentality of the crime and could be searched for and seized under a warrant specifically describing them. *State v. Bisaccia*, 213 A.2d 185 (Sup. Ct. N.J. 1965). Directly confronting the mere evidence rule, Chief Justice Weintraub argues cogently that "things may be seized for their inculpatory value alone and that a search to that end is valid, so long as it is not otherwise unreasonable * * *." 213 A.2d at 193. Even so staunch an exponent of "individual liberties" as Professor Kamisar has criticized the rule as "unsound and undesirable." Kamisar, "Public Safety v. Individual Liberties: Some 'Facts' and 'Theories,' " 53 J. Crim. L., C. & P. S. 171, 177 (1962). See also Comments, "Eavesdropping Orders

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articles having only evidential value is a proscription grounded on the Fourth Amendment. The Supreme Court has made it abundantly clear that the due process clause of the Fourteenth Amendment requires that all evidence seized in violation of the Fourth Amendment shall be excluded at state trials. See Beck v. Ohio, 379 U.S. 89 (1964); Aguilar v. Texas, 378 U.S. 108 (1964); Comment, "Search and Seizures of 'Mere Evidence' — Amendment to Or. Rev. Stat. Sec. 141.010 — Effect on Prior Law and Constitutionality," 43 Ore. L. Rev. 333, 346–49 (1964). *Cf.* Ker v. California, 374 U.S. 23, 34 (1963).

[11] Chief Justice Traynor, though expressing doubt as to the wisdom of the rule, held that the medical records under consideration were actually instruments of the crime — fraud in billing for welfare services — thus characterizing the disputed records as within a traditionally recognized category subject to seizure. As already pointed out, it cannot be maintained that this characterization could apply to the clothing in our case.

and the Fourth Amendment," 66 Colum. L. Rev. 355, 370 (1966). *But cf.* Note, "Evidentiary Searches: The Rule and the Reason," 54 Geo. L. J. 593 (1966).

Judges, aware of the practical problems faced by police officers and prosecutors in the performance of their duties, have sometimes strained mightily to overcome the exclusionary effect of the mere evidence rule by stretching to the point of distortion the category of "instrumentalities of crime," in order to achieve the admission in evidence of articles manifestly of evidential value only. For example, in *United States v. Guido*, 251 F.2d 1 (7th Cir.), *cert. denied*, 356 U.S. 950 (1958), it was broadly declared that shoes could be an instrumentality of crime, for a robber could hardly facilitate escape if he was "fleeing barefooted from the scene of the hold-up." 251 F.2d at 4. While the result in a particular case may not be unreasonable, it can hardly be squared with the pronouncements of the Supreme Court. See Note, "Evidentiary Searches: The Rule and the Reason," 54 Geo. L. J. 593, 610 n.106 (1966).

While we recognize that the rationale of the rule immunizing from seizure articles of only evidentiary value has been the subject of vigorous debate, we do not feel at liberty to abandon a doctrine so firmly established in the Supreme Court decisions.[12] It may be thought timely to expose the doctrine to re-examination and reinterpretation, with a view to formulating sufficiently flexible guidelines without endangering constitutional protections. However, unless the Court sees fit to depart from its oft reiterated position, the judges of subordinate courts are obligated to adhere to it.

For the reasons outlined, the order of the District Court must be reversed and the case remanded with directions to grant the writ of habeas corpus and discharge the petitioner unless the state will retry him within a reasonable time.

Reversed and remanded.

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[12] The impropriety of seizing and putting in evidence items of only evidential value traces back to Boyd v. United States, 116 U.S. 616 (1886).

ALBERT V. BRYAN, Circuit Judge, dissenting:

Because the District Judge's conclusions are for me irrefutable, I cannot join in overturning his decision, notwithstanding the trenchancy of the majority opinion. I find altogether untenable, in the circumstances here, its determinative basis: that the truck driver's jacket and trousers worn by the petitioner Hayden when he committed the robbery were unlawfully *seized* because they were "of evidential value only", and so not admissible at his trial.

The evidential rule of search and seizure has been sustained in other situations but it is inapposite in the setting of this case. The preliminary facts, unquestioned now, were stated by the District Judge as follows:

> "On or before March 16, 1962, a man named Miller delivered to Hayden a sawed-off shotgun and a P .38 Luger pistol, and Hayden acquired through Miller or otherwise some ammunition (sic) for both weapons. About 8 a.m. on March 17, armed with the pistol and perhaps also with the gun, Hayden struck Charles E. McGuirk on the head with the pistol and robbed him of some $363, which he had just obtained from the cashier's cage of the Diamond Cab Company. Two cab drivers saw Hayden running from the scene of the crime, looking back over his shoulder; they gave the alarm, and both of them *followed him several blocks to his home at 2111 Koko Lane, which one of the drivers saw him enter.* The Diamond Cab dispatcher reported to the police what he had learned from the victim and what he had learned over the radio from one of the cab drivers. This information was relayed over the police radio to a number of patrol cars, which came to Koko Lane promptly, some in less than five minutes after Hayden had entered the house. One of the cab drivers, who had parked at the corner nearest 2111 Koko Lane, pointed out to the officers the house which Hayden had entered; the officers knocked at the door, which was opened by Mrs. Hayden; they told her that they were looking for a robber who was reported to have entered the house, and said they would like to

speak to her husband and search the house. She offered no objection. . . ." (Accent added.)

As the validity of the officers' entry and search of the house are uncontested and uncontestable, the pivot of the present decision is the *seizure* of the clothing. Hayden ran home to escape "hot" pursuit by persons who had been at the scene of the robbery and saw him go in the house. They were dutifully and lawfully attempting to apprehend him. While the police were not initially in the chase, they joined while it was still in full cry. Had they collared Hayden before he crossed his threshold, or afterwards but before he undressed, the clothes he wore could unquestionably have been introduced in evidence as identification or for other purposes. *Robinson v. United States*, 283 F.2d 508 (D.C. Cir. 1960). How these articles were instantaneously immunized by his disrobement is unclear to me.

These garments were clues to the whereabouts of the robber. The officers did not know Hayden but they knew his attire. In fresh pursuit, they knew that the robber had sought asylum in the house; they did not know the refuge was his home. As the fugitive was not in sight on their entry, they were obliged to undertake a manhunt throughout the house. The seizure of the clothing occurred in the *hue and hunt* for the felon, as well as for the money, the pistol and the shotgun.

Obviously he was using his home as a hideout. Not until *after* the search of the cellar or basement for the felon, when the clothing was found, *was or could* Hayden be accused. Not until then were the police assured that no other man was in the house. On this point, the District Judge found:

"Hayden was feigning sleep in the back room on the *second* floor. Two or three officers roused and questioned him, and *when the officers who were searching the first floor and the cellar reported that no other man was in the house*, they arrested him. At about the same time one of the officers noticed that the toilet in the adjoining bathroom was running continuously, and

found the shotgun and pistol immersed in the flush tank. The officers found a clip of ammunition for the pistol, a sweater and a cap under the mattress of Hayden's bed, and ammunition for the shotgun in a bureau drawer in Hayden's room. Meanwhile, the officer who was searching the cellar for a man or the money found a *jacket and trousers of the type the fleeing man was said to have worn, with a leather belt still in place,* in a washing machine." (Accent added.)

While this finding conclusively demonstrates that the arrest was not made until *after* the seizure of the clothes, the relative times of the two incidents are not critical. The important fact is that the seizure was made in tracking the felon and not in collecting evidence, the basis of the precept the majority would enforce. No authority is cited holding that an article seized *in a hunt* for a criminal is inadmissible because it is "of evidential value only". Nor is the item rendered untouchable because found in a quest in the quarry's home.

Again, Hayden's discard and concealment of the habit in which he had been observed on the street were as indicative of guilt as was his flight. The secreting of himself in the house anywhere — in basement, attic, bedroom, closet or on the roof — would be provable as incriminating conduct. Had he donned a different garb or disguised himself to avoid capture, the dissemblance would certainly be open to proof at trial. The proof would include production of the clothes he hid as well as those in which he reappeared.

Deceptions frequently speak as forcefully as words, and surely whatever a fugitive said to mislead the officer is fair evidence against him. Simply because the conduct or words occur in the accused's home does not bar their admission. Devices and designs to thwart arrest or conviction have never, to my knowledge, been excluded as evidence against the schemer.

Finally, and most important, the clothing was seizable as something used in the commission of the crime, concededly a recognized exception to the rule against seizure of evi-

dence only. Pretending to be asleep, Hayden when finally discovered was undressed and abed. Assuredly, his purpose was to show that he was not equipped to commit a crime at the cab terminal only a few minutes before and several city blocks away. He thus made the issue of whether the apparel in which he had been seen was an aid — a means or an instrument — in his criminal act.

Examples of personal effects converted into implements of crime would be eyeglasses worn by an accused when he committed a crime, but not found on apprehension and without which he later demonstrates he cannot see; or artificial limbs worn at the time, but later hidden and without which he cannot walk or handle a weapon. This was virtually the reasoning in *United States v. Guido*, 251 F.2d 1, 3 (7 Cir. 1958), *cert. denied*, 356 U.S. 950, treating shoes as an instrument of the crime.

This is in no sense to declare clothes qua clothes to be tools of crime. Here, to repeat, they were put in this category by the accused's reliance on his near-nudeness to eliminate himself as the robbery suspect. They are not merely proof of identification. They establish his preparedness to perpetrate the offense; they belie his alibi.

If nakedness can be thus employed to raise a reasonable doubt of guilt, surely it can be refuted by the clothes he wore when he robbed and ran. If not, then to impede identification a criminal need only strip immediately he is inside his front door. Indeed, under the ruling of the Court, he need not bother to hide his clothes. Left plainly visible, they still would not be touchable for they would be of "evidential value only."

I cannot agree to Hayden's release or re-trial simply because his clothes were admitted in evidence.

ON PETITION FOR A REHEARING EN BANC

HAYNSWORTH, Chief Judge:

I join my brothers in an order denying a petition for rehearing en banc, but I take advantage of the occasion for a word of explanation.

The question in this case has been the subject of extended debate within the court. Judge Bell and I were not members of the panel that originally heard it, but we have participated actively in the discussion. As a result, it is apparent that a majority of the court is of the view that we are bound to apply the "mere evidence" rule because of the broad language employed by the Supreme Court in those opinions holding that private papers which could not have been classed as instruments of the crime are not subject to seizure.

Nevertheless, I think that the language the Supreme Court has employed must be read in the light of what it has held. Neither in what it has held nor in what it has said can I find an inexorable command that we hold inadmissible these articles reasonably seized in the course of a reasonable search.

The Fourth Amendment prohibits only those seizures that are unreasonable, as it prohibits only those searches that are unreasonable. It is one thing to say that a seizure of a diary containing incriminating entries is unreasonable as is a search having as its objective the discovery and the seizure of such a document. Each is prohibited by the Fourth and Fourteenth Amendments. It is quite another thing to say, however, that tangible articles discovered in the course of a reasonable search have the sanctity of private papers if they cannot be readily classified as instruments or fruits of the crime. An accused's cap on his head or his shoe on his foot has no such sanctity, and, in my view, such articles acquire none when removed from his person and placed in his closet. If the shoe is useful in comparison with the footprint which the culprit left when he fled the scene of the crime, or if a cap is useful in

resolving the uncertainties of visual identification, neither should have an immunity from seizure when discovered in the course of a reasonable and lawful search.

With the amendment's proscription of unreasonable searches and unreasonable seizures in mind, I can find nothing in what the Supreme Court has done and said which requires the rejection from evidence of these articles of clothing reasonably seized in the course of a search, which, concededly, was reasonable and lawful. We are not instructed to apply the underlying rule of reasonableness in an unreasonable manner.

As the standards for the admission of confessions are undergoing a continuing process of stiffening, the police are admonished to place greater dependence upon their resources for scientific investigation. Make an impression of the footprint discovered at the scene, they are told, and be prepared to make extensive laboratory analyses of the dried blood on the shirt. Such investigatory procedures will be of little use, however, unless investigators are afforded a reasonable opportunity to obtain possession of the shoe for comparison with the impression and of the bloody shirt for laboratory analysis.

I find nothing unreasonable in the majority's preference that the Supreme Court deal with the matter, but, until it does so explicitly, I think subordinate courts are free to declare seizures of articles such as these to be reasonable and not unconstitutional. Merely because of difficulty in stretching the term "instruments of the crime" to encompass them, I do not think they are immune from reasonable seizure in the course of a lawful search. The fact that articles are incriminatory has never in itself been an objection to their seizure.

A majority of the court, however, is of the view that we may not consider the question unsettled. Since, informally, the entire court has thoroughly canvassed our freedom to follow our own notions, it is most unlikely that a rehearing en banc would serve any useful purpose whatever. It is for that reason that I join in the order denying the petition.

JUDGMENT

(Filed and entered April 21, 1966)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10,061

BENNIE JOE HAYDEN,

Appellant.

v.

WARDEN, MARYLAND PENITENTIARY,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

This cause came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the order of the said District Court appealed from, in this cause, be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the United States District Court for the District of Maryland, at Baltimore, for further proceedings consistent with the opinion of the Court filed herein.

SIMON E. SOBELOFF,

United States Circuit Judge.

ORDER

(Filed and entered June 3, 1966)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10,061

BENNIE JOE HAYDEN,

Appellant,

v.

WARDEN, MARYLAND PENITENTIARY,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND,
AT BALTIMORE.

The court, having fully considered appellee's petition for rehearing en banc, hereby denies the same.

CLEMENT F. HAYNSWORTH, JR.,
Chief Judge, Fourth Circuit.

SIMON E. SOBELOFF,
United States Circuit Judge.

HERBERT S. BOREMAN,
United States Circuit Judge.

ALBERT V. BRYAN,
United States Circuit Judge.

J. SPENCER BELL,
United States Circuit Judge.

A true copy,

Teste:

MAURICE S. DEAN,
Clerk, U.S. Court of Appeals
for the Fourth Circuit.
By MARGARET M. WALTON,
Deputy Clerk.

OPINION OF THE DISTRICT COURT

(Filed March 3, 1965)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL NO. 14388

BENNIE JOE HAYDEN

v.

WARDEN, MARYLAND PENITENTIARY

Alva P. Weaver, III, court-appointed, for petitioner.

Thomas B. Finan, Attorney General of Maryland, and Franklin Goldstein, Assistant Attorney General, for respondent.

THOMSEN, Chief Judge:

Petitioner (Hayden) is serving a sentence of fourteen years in the Maryland Penitentiary following his conviction by Judge Manley in the Criminal Court of Baltimore of robbery with a deadly weapon. In his present petition for a writ of habeas corpus and at the hearing thereon he pressed five contentions: (1) that his arrest was illegal; (2) that a search of his house and the seizure of guns, ammunition and clothing made at the time of his arrest was illegal; (3) that his representation at his trial in the Criminal Court was inadequate, because no objection was made to the introduction into evidence of the material so seized; (4) that the prosecuting witness failed to identify him; and (5) that the indictment was based on hearsay.

In view of various proceedings in the State Courts and the failure of Hayden to enter or to press certain appeals

or applications to appeal to the Court of Appeals of Maryland, there is serious doubt as to what questions Hayden is entitled to raise here. Nevertheless, this Court has permitted Hayden and his counsel to offer in evidence whatever testimony and exhibits they wished to offer, including the transcripts of his trial in May 1962 and of the hearing before Judge Sodaro in March 1964. There is some conflict between the testimony of the witnesses given at the trial and their testimony in this Court, largely due to the lapse of time. As Hayden's wife recognized on the stand, she did not remember all the details after three years. Neither did the busy police officers. Hayden himself is not a trustworthy witness. From all the evidence, after weighing the credibility of the witnesses, this Court finds the following facts.

On or before March 16, 1962, a man named Miller delivered to Hayden a sawed-off shotgun and a P .38 Luger pistol, and Hayden acquired through Miller or otherwise some ammunition for both weapons. About 8 a.m. on March 17, armed with the pistol and perhaps also with the gun, Hayden struck Charles E. McGuirk on the head with the pistol and robbed him of some $363, which he had just obtained from the cashier's cage of the Diamond Cab Company. Two cab drivers saw Hayden running from the scene of the crime, looking back over his shoulder; they gave the alarm, and both of them followed him several blocks to his home at 2111 Koko Lane, which one of the drivers saw him enter. The Diamond Cab dispatcher reported to the police what he had learned from the victim and what he had learned over the radio from one of the cab drivers. This information was relayed over the police radio to a number of patrol cars, which came to Koko Lane promptly, some in less than five minutes after Hayden had entered the house. One of the cab drivers, who had parked at the corner nearest 2111 Koko Lane, pointed out to the officers the house which Hayden had entered; the officers knocked at the door, which was opened by Mrs. Hayden; they told her that they were looking for a robber who was reported to have entered the house, and said they would like to speak to her husband and search the house. She offered no objec-

tion. Based upon the testimony offered before him at the Post Conviction Procedure Act (PCPA) hearing, Judge Sodaro found that Mrs. Hayden "gave the policeman permission to enter the home". The fuller evidence before this Court is conflicting, but this Court need not decide whether to accept the State Court's finding of that historical fact, nor resolve the conflict in the testimony, because it is clear that the officers had reasonable cause to believe that a felony had been committed and that the felon had entered the house; under the law discussed below, they were justified in entering and searching the house for the felon, for his weapons and for the fruits of the robbery.

Hayden was feigning sleep in the back room on the second floor. Two or three officers roused and questioned him, and when the officers who were searching the first floor and the cellar reported that no other man was in the house, they arrested him. At about the same time one of the officers noticed that the toilet in the adjoining bathroom was running continuously, and found the shotgun and pistol immersed in the flush tank. The officers found a clip of ammunition for the pistol, a sweater and a cap under the mattress of Hayden's bed, and ammunition for the shotgun in a bureau drawer in Hayden's room. Meanwhile, the officer who was searching the cellar for a man or the money found a jacket and trousers of the type the fleeing man was said to have worn, with a leather belt still in place, in a washing machine.

Hayden was arrested and taken to the police station, along with the items referred to above. He made no admissions to the police. He was represented by counsel at his preliminary hearing, and after his indictment engaged an attorney with wide experience in criminal cases to represent him at his trial.

The victim could not identify Hayden, but described the clothing worn by the robber, and testified that the weapon held by the robber had a barrel like the P .38. The two taxi drivers identified Hayden as the many they saw running from the scene of the robbery. Several police officers testified, and the guns, ammunition and clothing seized at

the time of the arrest were admitted in evidence without objection. The strategy of Hayden's trial counsel was to question the identification of Hayden and to attack the credibility of the important State witnesses by vigorous cross-examination with respect to the color of the clothes and other matters. He felt that there were reasonable grounds for the arrest and the search, and since the explanation which he had for the pistol included the shotgun, felt there was no point in objecting to the introduction into evidence of the gun and its ammunition. The introduction into evidence of the sweater helped rather than hurt Hayden; the State might have been criticized if it had failed to produce the sweater, which was found under the mattress and was not like the clothing described by the victim and other State witnesses. Judge Manley postponed the closing of the testimony so that the defendant might produce Miller. After argument on May 28, 1962, Judge Manley found Hayden guilty of robbery with a deadly weapon.[1] Sentence was postponed pending a possible motion for a new trial, but after Hayden had discussed the matter with his trial counsel he decided not to file such a motion. He was sentenced on June 8, 1962, to a term of fourteen years, accounting from March 17, 1962.

Contrary to the testimony of Hayden, this Court finds that his trial counsel advised him of his right of appeal, and told him how he might proceed in forma pauperis. Hayden, however, decided not to appeal, probably because the sentence might have been considerably longer, but parted with his counsel on the note that they would seek parole after three and a half years.

As soon as Hayden reached the penitentiary he received "legal" advice from his fellow inmates, and filed a petition under the PCPA in less than three weeks, on June 28, 1962. Before that petition could be heard he filed, on August 8, 1962, a motion to strike the conviction and sentence. The latter motion was heard first and was denied on November

[1] The reasons Judge Manley gave for his findings are set out in the transcript of the trial, pp. 152–154.

14, 1962. An appeal from that denial was dismissed on January 17, 1963.

On April 23, 1963, an experienced attorney was appointed to represent Hayden in his PCPA proceeding. In his amended petition for relief therein he asserted: (1) that his home was forcibly entered and searched; (2) that the prosecuting witness failed to positively identify him; (3) that the *nolle prosequi* by the State of a count in the indictment was proof of innocence; and (4) that he had been denied a speedy trial. At the post conviction hearing, he further asserted (5) that he was indicted on hearsay evidence and (6) that he was dissatisfied with the services of trial counsel for failure to object to hearsay evidence produced at the trial.

Judge Sodaro disposed of all of those contentions after a hearing at which no testimony was taken. Only two of his rulings are important here: (1) Judge Sodaro held that "questions of the legality of search and seizure relating to the admissibility of evidence obtained by an allegedly illegal search and seizure should have been raised at the trial, and are not grounds for relief under the Act"; and (6) after noting that Hayden had testified that he was not satisfied with the services of his attorney because the attorney had failed to object to hearsay evidence at the trial, Judge Sodaro stated: "This is a bald assertion unsupported by any specifics, and is also without merit. He does not claim that his attorney for any other reason was incompetent or failed to properly represent him."

Leave to appeal from Judge Sodaro's order was granted and the case was remanded for further proceedings. *Hayden v. Warden*, 233 Md. 613, 195 A.2d 692 (1963). The Court of Appeals said:

> "For the reasons stated by Judge Sodaro in the lower court, we agree that the applicant was not entitled to post conviction relief for any of the reasons stated in the second through the sixth contentions, but this may not be true with respect to the first contention, concerning the search of his home and arrest without a

warrant which the applicant subsequently stated was his basic contention.

"* * * We think the question should first have been considered as one of fact rather than a question of law."

On remand, Judge Sodaro granted a hearing, at which petitioner, represented by experienced counsel, testified. His wife wrote that she had moved to Detroit and was unable to attend the hearing. Hayden did not suggest that any effort be made to take her deposition. She had testified at the trial, and Hayden was evidently satisfied with that testimony. Officer Parrish was the only officer who was called to testify by either side. On March 19, 1964, Judge Sodaro filed an order denying relief, in which he set forth specific findings of fact with respect to the arrest and the search and seizure, and as a result of his findings of fact, "concluded that the Petitioner's contention is without merit and that his arrest was legal and that the search of his home and the seizure of the articles in question were proper."

On March 24, 1964, Hayden filed an application for leave to appeal from Judge Sodaro's order. On April 25, however, Hayden sent a letter to the Clerk of the Court of Appeals of Maryland requesting the withdrawal of the application for leave to appeal. His request was granted on April 29. Hayden thereupon filed three petitions for writs of habeas corpus, one in the Circuit Court for Washington County and two in the Circuit Court for Prince George's County, all of which were denied.

Meanwhile, Hayden had filed two petitions for writs of habeas corpus in this Court, one of which was denied by me on February 4, 1963, and the other by Judge Winter on September 10, 1963, both because Hayden had not exhausted his State remedies.

His State remedies are now exhausted. It is a close question whether failure to appeal from his conviction and his withdrawal of his application for leave to appeal from Judge Sodaro's second order were deliberate by-passes of available State remedies within the meaning of *Fay v. Noia*,

372 U.S. 393 (1963); *Hunt v. Warden*, 4 Cir., 335 F.2d 936 (1964); and *Pruitt v. Peyton*, 4 Cir., 338 F.2d 859 (1964). Hayden is intelligent, familiar with legal terms and concepts, an avid reader of Supreme Court reports, and an untrustworthy witness. The Court of Appeals of Maryland has already ruled in his favor on one appeal. From the evidence, however, I do not find such a deliberate by-pass or waiver as would prevent his raising in this Court the issues of illegal arrest and illegal search and seizure.

(1) *Legality of Arrest.* This Court would be justified in accepting the findings of historical fact made by Judge Sodaro on that issue following the second hearing before him, which met all of the tests set out in *Townsend v. Sain*, 372 U.S. 293 (1963). However, as noted above, this Court need not decide whether to accept the State Court's finding that Mrs. Hayden "gave the policeman permission to enter the home" nor resolve the conflict in the testimony in this Court on that point, because this Court has found from the evidence that the officers had reasonable cause to believe that a felony had been committed and that the felon had entered the house. They were therefore justified in entering the house after announcing their authority and purpose, whether or not permission was given. *Beck v. State of Ohio*, 376 U.S. 905 (1964); *Henry v. United States*, 361 U.S. 98 (1959); *Draper v. United States*, 358 U.S. 307 (1959); *Brinegar v. United States*, 338 U.S. 160 (1949); *Carroll v. United States*, 267 U.S. 132 (1925); *Chappell v. United States*, D.C. Cir., ... F.2d ..... (1965); *Miller v. United States*, 357 U.S. 301 (1958); *Davis v. State*, 236 Md. 389 (1964); *Mulcahy v. State*, 221 Md. 413 (1959); see *Ker v. California*, 374 U.S. 23, at 37 et seq.; *Ralph v. Pepersack*, 4 Cir., 335 F.2d 128 (1964).

(2) *Extent of the Search.* Under the evidence the officers were justified in searching the house not only for the man who had been seen entering the house, but also for any weapons he might have used and for the fruits of the crime, the money taken from the victim. The search was made incident to the arrest, and within a few minutes thereof. The clothing was found while one of the officers was in the base-

ment looking for a man and the money; the pistol and the shotgun were found in the bathroom whose door was three feet from Hayden's room, after an officer noticed that the toilet was running continuously. The search and seizures were not unreasonable. *Harris v. United States*, 331 U.S. 145 (1947); *Abel v. United States*, 362 U.S. 217 (1959); *United States v. Rabinowitz*, 339 U.S. 56 (1950); *Ker v. California*, 374 U.S. 23 (1963); *Rees v. Peyton*, 4 Cir., ... F.2d ..... (1965); *Collins v. Klinger*, 9 Cir., 332 F.2d 504 (1964); *Leahy v. United States*, 9 Cir., 272 F.2d 47 (1960); *Davis v. State*, 236 Md. 389 (1964).

(3) *Adequacy of Representation.* Hayden was represented at his trial by counsel of his own choosing, widely experienced in criminal cases, who exercised his best judgment as to how the case should be tried. Hayden made no objection to his counsel or to the Court at the time, and may well be held to have waived any objections to matters of strategy and tactics. In any event, his representation by his trial counsel was not so inadequate as to amount to a denial of Hayden's constitutional rights. *Snead v. Smythe*, 4 Cir., 273 F.2d 838 (1959); *Brown v. Pepersack*, 4 Cir., 334 F.2d 9 (1964); cf. *Bowler v. Warden*, 4 Cir., 334 F.2d 202 (1964).

(4) *Failure of Prosecuting Witness to Identify Hayden.* In view of the other evidence there is no merit to this point.

(5) *Indictment Based on Hearsay.* If true, and there is no evidence to support the charge, this point would be without merit. *Costello v. United States*, 350 U.S. 359 (1956).

The relief prayed is hereby denied, and Hayden is hereby remanded to the custody of respondent.

(Signed) ROSZEL C. THOMSEN,

Chief Judge,

U.S. District Court.